Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-327

JACK WEINSTEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner, JACK WEINSTEIN, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 3, 1976.

OPINION BELOW

The Memorandum of Affirmance was entered by the United States Court of Appeals on May 17, 1976. Said Memorandum of Affirmance is attached hereto as Exhibit "A". Further, the Order denying the Petition for Rehearing filed August 3, 1976 is attached as Exhibit "B".

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court below erred in denying Petitioner's Motion to Suppress Evidence Seized pursuant to a Search Warrant executed At His Places of Business on August 4, 1973.

2. Whether the District Court Below Erred in Denying Petitioner's Motion for Judgment of Acquittal Under Rule 29(b) of The Federal Rules of Criminal Procedure At the Close of All of the Evidence.

STATUTES INVOLVED

Title 18, United States Code, Sections 371, 2314 and 2.

Federal Rules of Criminal Procedure 29(b).

STATEMENT OF THE CASE

The Petitioner, JACK WEINSTEIN, was indicted by a Federal Grand Jury in Las Vegas, Nevada, on May 9, 1974. He was tried before the Honorable J. BLAINE ANDERSON, United States District Judge, District of Idaho, with a jury, commencing April 9, 1975, and ending April 18, 1975, on two counts charging him with Conspiracy and Interstate Transportation of Stolen

Property in violation of Title 18, United States Code, Sections 371, 2314 and 2. Indicted with the Petitioner were three other defendants: BOBBY GENE JONES, DARYL ELTON HODGES and GLEN RUSSELL SHEPARD. The Government dismissed the indictment as to Defendant HODGES, and Defendants JONES and SHEPARD entered pleas of guilty to Count I of the indictment.

The facts as adduced by the Government's witnesses in this matter conclusively established that during the period of May through June of 1973, burglaries were committed of certain jewelry stores and homes in the Kansas City, Missouri, area by Defendants SHEPARD and JONES. FRANK GOODDEN, a jeweler in Kansas City, Missouri, testified that his store was burglarized on May 6, 1973, and that numerous items were taken. DAVID GARRELTS testified that he was the store manager of a jewelry store in Kansas City, Missouri, which was burglarized on June 6, 1973. WILLIAM HUFF testified that his father's home was broken into on May 27, 1973, and that numerous items of jewelry and other items of value were taken from the home. Mr. HUFF'S father, having died between the period of the burglary and the commencement of the trial, was a collector of antique watches. All three of the above named victims of these burglaries identified numerous items of jewelry which were admitted into evidence during the Government's case. Some of these items were recovered from Petitioner WEINSTEIN'S jewelry store or his pawn shop located in Las Vegas, Nevada. Others of these items were recovered from Defendant JONES' car when he was arrested in July of 1973, in Las Vegas, Nevada.

RUTH HERRON SMITH testified that she worked at Petitioner WEINSTEIN'S jewelry store, the Tower of Jewels, as a sales clerk from approximately February through June of 1973. She met Defendant JONES at the jewelry store in mid-April or early May, 1973. Defendant JONES came into the jewelry store and met with the Petitioner in Petitioner's office several times during the Spring of 1973. RUTH HERRON SMITH also testified that she became socially friendly with Defendant JONES during this period of time, and rented him a room at her home near the end of May, 1973. Mrs. SMITH stated that on approximately June 20, 1973, she told JONES that she was planning a trip to visit her grandparents in Ft. Worth, Texas, and that JONES suggested that she fly to Kansas City, Missouri, meet him there and they would go together to Ft. Worth. She did in fact fly to Kansas City where JONES met her at the airport and took her to the Holiday Inn. JONES paid for her airline ticket.

In Kansas City JONES introduced her to the Defendants SHEPARD and HODGES. After remaining in Kansas City for a short period of time, she and JONES drove to Ft. Worth, Texas, and SHEPARD and HODGES drove with them to Ft. Worth in a different car. From Ft. Worth the four same individuals went to Phoenix, Arizona, also in the two separate cars. From Phoenix they continued on to Las Vegas. Mrs. SMITH testified that she left the employment of Petitioner WEINSTEIN prior to leaving for Kansas City, on approximately June 20, 1973.

On July 5, 1973, Mrs. SMITH testified that she accompanied Mr. JONES to Van Buren and Cox, a jewelry store in Las Vegas, Nevada, to retrieve some antique watches which JONES had left at the jewelry

store. She further testified that she was told by Mr. JONES that he had a pawn shop in Kansas City and sold items of jewelry to the Petitioner.

SHIRLEY ROBB testified that she accompanied Defendant JONES to the Tower of Jewels around the end of April, 1973, at which time JONES introduced her to Petitioner WEINSTEIN, and JONES and WEINSTEIN then had a meeting out of her presence where she believes the Petitioner purchased some jewelry from JONES. She testified there may have been another time when she accompanied Mr. JONES to the Tower of Jewels, but she was not sure of this occurrence. She further testified upon cross-examination that she never met Defendant SHEPARD in Las Vegas but did meet him in Kansas City. She also stated that to her knowledge Defendant JONES was a burglar, and was associated with a pawn shop in Kansas City. SHIRLEY ROBB was also told by JONES that he had been involved in a burglary of a jewelry store called Jaccard's in Kansas City and that JONES had sold stolen jewelry to the Petitioner on several occasions.

Special Agent WILLIAM JONKEY of the Federal Bureau of Investigation testified that on July 3, 1973, he received two teletypes in reference to BOBBY GENE JONES. The teletypes indicated that Mr. JONES may have been involved in several burglaries in the Kansas City, Missouri, and Phoenix, Arizona, areas, and that Defendant HODGES had been arrested by the Phoenix Police Department for possible involvement in a burglary committed in Phoenix. The teletypes also indicated that JONES may be utilizing Las Vegas Loan and Jewelry, Petitioner WEINSTEIN'S pawn shop, to sell stolen jewelry. Agent JONKEY, in response to these teletypes, on July 5, 1973, went to Petitioner's store

and spoke to Mr. WEINSTEIN. At the initial conference, at approximately 10:00 A.M., Agent JONKEY asked the Petitioner if he knew BOBBY GENE JONES, to which the Petitioner replied in the affirmative. The Petitioner stated that he had done business with JONES for several months and, in fact, JONES had been at the jewelry store the previous day, July 4, 1973, and the Petitioner had purchased some coins from JONES. The Petitioner also stated that JONES was affiliated with a pawn shop in Kansas City known as Sam's Loans. Agent JONKEY asked Petitioner WEINSTEIN if he had ever purchased diamonds or jewelry from JONES, to which Petitioner WEINSTEIN replied in the negative. Agent JONKEY asked the Petitioner if he knew where JONES was at the present time and the Appellant gave Agent JONKEY RUTH SMITH'S address where he thought JONES might be.

Later on this same day, July 5, 1973, Agent JONKEY returned to the Tower of Jewels, at approximately 2:00 P.M., and again asked the Petitioner if he had ever purchased diamonds or jewelry from JONES. Again Petitioner WEINSTEIN said no, that the only items he purchased were coins. Agent JONKEY testified that on August 3, 1973, he obtained search warrants for the Tower of Jewels and Las Vegas Loan and Jewelry and executed the same on August 4, 1973, at which time numerous items which had been previously identified by witnesses GODDEN, CARRELTS and HUFF were seized.

Co-Defendant GLEN R. SHEPARD was then called as a witness by the Government. SHEPARD testified that on June 6, 1973, he met Defendant JONES and discussed robbing Jaccard's Jewelry Store in Kansas

City. Defendant HODGES was present at the time of these discussions. SHEPARD testified that he did then in fact commit the burglary of items from this jewelry store on June 6, 1973, and he has pled guilty in State Court to these charges. SHEPARD also testified that he has two prior felony convictions. SHEPARD stated that Defendant JONES acted as a look-out during the commission of this burglary and that he and HODGES met JONES after the burglary in a trailer being utilized by JONES. In the trailer, according to SHEPARD, SHEPARD and HODGES sold most of the items stolen to Defendant JONES for $500. Defendant SHEPARD was shown two black opals, marked Government Exhibit 40, which he identified as items taken from this jewelry store. SHEPARD stated that JONES told him that these were rare stones, and that they are only mined from one location in the world. SHEPARD also identified Government Exhibits 41 and 42, being an oval opal, and a marquise diamond, and Government Exhibits 5A and 5B, being a triangular-shaped diamond, all of which SHEPARD stated were taken from Jaccard's Jewelry Store and given to Defendant JONES.

According to SHEPARD, a few days after the burglary he and JONES discussed coming to Las Vegas for the purpose of getting rid of some of the stolen property. However, SHEPARD inadvertently missed meeting JONES when JONES allegedly left for Las Vegas, and SHEPARD did not see JONES until approximately June 13, or 14, 1973, when JONES returned from Las Vegas. At this time, according to SHEPARD, JONES told him over the telephone that the police were looking for them, that they better get out of town and go to Las Vegas, and that he, JONES,

had a place for getting rid of stolen materials in Las Vegas. JONES also told SHEPARD, according to SHEPARD, that his man in Las Vegas would buy anything they could get, that JONES had sold him stolen goods before, and that he had received approximately $10,000.00 cash from his Las Vegas contact.

SHEPARD testified that on approximately June 21, 1973, he left for Las Vegas in a car with Defendant HODGES, with Defendant JONES and a girl named RUTH leaving in a different car. SHEPARD testified they went from Kansas City to Ft. Worth, then to Phoenix, then to Las Vegas. SHEPARD testified that prior to this trip and during this trip he saw boxes in which he believed were contained watches in the trunk of Defendant JONES' car. Upon arriving in Las Vegas, SHEPARD testified he checked into a motel with HODGES, registering under fictitious names, and that JONES stayed with RUTH.

SHEPARD further testified that the day after they arrived in Las Vegas, approximately 12:00 noon, he, JONES, and RUTH went down town. RUTH went to a McDonald's Restaurant, and he and JONES went to the Tower of Jewels. SHEPARD then testified that JONES introduced him to Petitioner JACK WEINSTEIN, and JONES told WEINSTEIN that SHEPARD was the individual who had gone into Jaccard's Jewelry Store and stolen the diamonds. SHEPARD then testified that WEINSTEIN said "that's the Jack Rabbit, is it?" (Tr. 361). SHEPARD further testified that JONES then gave quite a bit of material to WEINSTEIN, including two opals, and JONES stated that these were the opals that he had told WEINSTEIN about. JONES later told SHEPARD that he had received $1,000.00 from WEINSTEIN for the opals.

SHEPARD testified that he stayed in Las Vegas for approximately three days, then leaving for Phoenix with HODGES and JONES. In Phoenix, SHEPARD stated that he, JONES and HODGES burglarized another jewelry store by the name of Joseph's. After this burglary JONES, SHEPARD and SHEPARD'S wife, who had flown to Phoenix and met SHEPARD there, drove back to Las Vegas. HODGES did not accompany them, and SHEPARD believed that he had been arrested in Phoenix. Upon their return to Las Vegas, SHEPARD registered himself, his wife and JONES into the Royal Inn where they stayed approximately two or three days. SHEPARD stated that the day after arriving back in Las Vegas, at approximately 11:00 A.M., he and JONES went to the Tower of Jewels and again met Petitioner WEINSTEIN. At the Tower of Jewels, according to SHEPARD, JONES told WEINSTEIN that they had burglarized Joseph's Jewelry Store, and WEINSTEIN was shown certain items taken from Joseph's.

On cross-examination, SHEPARD did state that it was his idea to commit the burglary at Jaccard's. He further stated that he had no idea how the stolen jewelry got to Las Vegas from Missouri.

The Government then called CYRUS LLEWELLYN, who was accepted as an expert in evaluating the value of gems. Mr. LLEWELLYN went through most of the jewelry items listed in the indictment and gave his opinion as to their value.

The last Government witness was LEO KLEIN who was accepted as an expert in evaluating stamps, having been a philatelist for many years. Mr. KLEIN stated his opinion as to the value of Government Exhibit 99, a rare stamp, taken in the burglary of the HUFF residence near Kansas City.

A Motion for Judgment of Acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure was then made by Petitioner WEINSTEIN and denied.

KATRINA HALL testified for Petitioner WEINSTEIN. She was employed as a sales clerk at the Tower of Jewels from March through July of 1973. She, on many occasions, saw Defendant JONES in the store in May and June of 1973. She never saw Defendant SHEPARD at the Tower of Jewels.

MITCHELL BAUMSTEIN, a jeweler employed at the Tower of Jewels, testified that he had met Defendant JONES on numerous occasions at the Tower of Jewels in April and May of 1973. In fact, he had made a few pieces of jewelry for JONES. Mr. BAUMSTEIN testified he never saw Mr. SHEPARD at the Tower of Jewels, and never saw Mr. JONES come to the Tower of Jewels with any other gentleman.

NANCY LANGDON, a bookkeeper for Petitioner WEINSTEIN'S businesses, testified that she saw JONES on numerous occasions at Mr. WEINSTEIN'S businesses. She identified Defendant's Exhibit G, which was a registered, return-receipt for an item of jewerly mailed to JONES care of Sam's Loan Office in Kansas City.

Petitioner WEINSTEIN presented eight character witnesses in his behalf, all of whom testified that his reputation in the community for truth, honest and integrity was good and excellent. These character witnesses included businessmen, a doctor, a sergeant with the Las Vegas Metropolitan Police Department, another individual involved in the jewerly business in Las Vegas, and the sister-in-law of the Sheriff of Clark County, Nevada.

BOBBY GENE JONES was called as a witness for the defense and testified that in approximately March or

April of 1973, he received a call from Co-Defendant SHEPARD. SHEPARD was in jail and needed money in order to post a bond. JONES stated that he loaned him the money to bail him out on the charge of possession of narcotics. JONES testified SHEPARD used narcotics. The day after loaning SHEPARD the money for a bail bond, SHEPARD was again arrested for shooting a narcotics dealer, and JONES again loaned money to SHEPARD for the purpose of a bail bond.

JONES testified that he first met Petitioner WEINSTEIN on March 9, 1973, when JONES went to WEINSTEIN'S pawn shop and pawned a ring. JONES gave WEINSTEIN some business cards indicating that JONES was affiliated with Sam's Loan in Kansas City. JONES testified that he sold WEINSTEIN some jewelry items, scrap gold and small diamonds, telling WEINSTEIN that they were from Sam's Pawn Shop. JONES also testified that in this same time frame he sold other materials to other jewelers and pawn shops in Las Vegas.

JONES testified that he made several later trips to Las Vegas for the purpose of selling miscellaneous items, always going to numerous jewelry and pawn shops to obtain the best price. JONES stated that he invariably went to the Tower of Jewels because Petitioner WEINSTEIN paid cash and because Petitioner WEINSTEIN liked gold.

JONES continued by testifying that he had met RUTH HERRON SMITH at the Tower of Jewels and did meet Mrs. SMITH when she flew to Kansas City on approximately June 21, 1973. JONES stated that from June 21, to July 4, 1973, he was not at the Tower of Jewels at all.

JONES testified that SHEPARD brought him some jewelry and loose stones in payment for the money that JONES had laid out for SHEPARD's bonds. JONES gave SHEPARD $500.00 cash in further payment for this jewelry. JONES testified that SHEPARD did not tell him that this jewelry was stolen property, but JONES believed that it was stolen.

JONES continued by testifying that on June 29, 1973, after checking into a motel in Las Vegas, he did not go to the Tower of Jewels with SHEPARD; JONES testified he never took SHEPARD to the Tower of Jewels.

JONES stated that the day after he arrived in Las Vegas in late June of 1973, his wife flew to Las Vegas and met him, and then he and his wife drove to Phoenix. JONES was contemplating opening a store in Phoenix, and he wanted to see what he could accomplish towards this goal. He also stated that he went to see a friend of his, one CHARLIE DYER, who was the director of the Seven Step Foundation. JONES testified that SHEPARD called him at the Seven Step Foundation and left a message there for him and that JONES then returned the call to SHEPARD in Las Vegas. JONES stated that SHEPARD requested money, so that SHEPARD could drive to Phoenix. JONES testified that he told SHEPARD to pawn some watches and that he, JONES, would give him some money when they met in Phoenix. JONES continued by stating that he and his wife, after meeting SHEPARD in Phoenix, drove back to Las Vegas and checked into the Royal Inn Hotel. According to JONES, SHEPARD came with them in the car from Phoenix to Las Vegas. JONES further testified that his wife flew back to Kansas City the next day and SHEPARD then flew back to Kansas City.

JONES testified that on July 4, 1973, he sold Petitioner WEINSTEIN some gold coins, and attempted to sell WEINSTEIN some diamonds but was not offered enough money for the diamonds. JONES continued by stating that after selling WEINSTEIN the gold coins, he went to Van Buren & Cox Jewelry Store and retrieved some watches that he had left there in the past. JONES stated that the watche found in his trunk were the watches he had retrieved from Van Buren & Cox, that he had originally received them in Kansas City, that they were flown by his wife to Las Vegas from Kansas City approximately June 9, 1973, and that he had left them at Van Buren & Cox in an attempt to sell them.

JONES was shown Government Exhibit 40, the two opals, and testified that he did not sell these opals to Petitioner WEINSTEIN. Defendant JONES was also shown Government Exhibits 41 and 42, being an opal and a marquise diamond. JONES testified he never sold Petitioner WEINSTEIN any opals, and he doesn't recall selling Petitioner WEINSTEIN any stone as large as the marquise diamond (Government Exhibit 42). JONES testified that he remembered selling a triangular-shaped diamond similar to Government Exhibit 5A to WEINSTEIN in May or June, but he could not be sure that this was the same diamond. JONES reiterated that he had never taken SHEPARD to the Tower of Jewels when he transacted business with Petitioner WEINSTEIN.

On cross-examination JONES admitted numerous previous felony convictions, and stated that he has been incarcerated most of his adult life. JONES stated that he went to work at Sam's Pawn Shop in Kansas City in approximately October, 1972, but was not an owner or related to the owners of the pawn shop even though he

did represent this fact to many people. JONES stated he did not participate in the burglary of Godden's Jewelry Store and that he didn't know that the items sold and given to him by SHEPARD were stolen when he received them. He also testified that he did not participate in the burglary of the HUFF residence and did not participate in the burglary of Jaccard's Jewelry Store on June 6, 1973. That the evening of June 6, 1973, when SHEPARD and HODGES came to his trailer with certain items of jewelry, JONES testified he assumed they were stolen but did not know for sure.

JONES testified that he had on numerous occasions between March and June of 1973, sold miscellaneous items of jewelry and small diamonds to Petitioner WEINSTEIN. JONES further stated that he did go with SHEPARD to Seron's Jewelry Store.

Petitioner WEINSTEIN then presented testimony through JOHN R. FISH, a jeweler for approximately 21 years, who is accepted as an expert on gems and their appraisal, which conflicted with the testimony presented by the Government through its expert. Mr. FISH testified that most of the items of jewelry involved in this case were "pawn-shop" type jewelry, and that the two opals composing Government Exhibit 40 were sugar-coated, and worth approximately $30.00 per carat.

Two witnesses were then called by Petitioner WEINSTEIN who testified that they knew Defendant JONES, had seen him on numerous occasions at the Tower of Jewels, but had never seen him come to the Tower of Jewels with another person. Both of these witnesses, upon observing Defendant SHEPARD, were unable to identify him and testified that they had never seen him before.

The assistant hotel manager from the Royal Inn Hotel in Las Vegas was called as a witness as the custodian of records for the hotel. Through this witness the registration record for BOBBY JONES was admitted into evidence as Defense Exhibit O. This Exhibit showed that BOBBY JONES registered at the Royal Inn on July 3, 1973, at 1:35 A.M. and checked out of the hotel on July 4, 1973, at 10:17 A.M.

GLEN SHEPARD was recalled as a witness for the defense. He testified that he never went to Seron's Jewelry Store in Las Vegas with Defendant JONES. He testified that he and JONES registered at the Royal Inn at Approximately 5:00 to 5:30 P.M. on the day they arrived in Las Vegas from Phoenix. Upon SHEPARD being asked to describe the interior of the Tower of Jewels, he testified that he did not see a vault or a vault door when he was in the Tower of Jewels. Defense Exhibits introduced, being photographs of the interior of the Tower of Jewels, showed a large vault readily visible from the entrance-way to the Tower of Jewels.

Petitioner WEINSTEIN took the stand on his own behalf and testified that he first met Defendant JONES on approximately March 10, 1973. WEINSTEIN testified that he did purchase on that date miscellaneous jewelry and gold from JONES. Petitioner WEINSTEIN continued by testifying that on numerous occasions he purchased miscellaneous items of "pawn-shop" type jewelry from JONES and on occasion purchased loose diamonds from him. Petitioner WEINSTEIN testified that he believed that JONES was affiliated with a pawn shop in Kansas City, having received a business card from JONES containing the name of that pawn shop.

Petitioner WEINSTEIN testified that the first time he ever saw Defendant SHEPARD was at court at approximately the time of his arraignment; he testified that he never saw SHEPARD at the Tower of Jewels.

Petitioner WEINSTEIN testified that from June 26, 1973, through June 28, 1973, he travelled from Las Vegas to Albuquerque, New Mexico, where he purchased some items for his store. Defense Exhibits R, S and T were admitted into evidence corroborating the fact that Petitioner WEINSTEIN was in fact out of the Las Vegas area on these dates.

Petitioner WEINSTEIN testified he did see Defendant JONES on July 4, 1973, at which time JONES attempted to sell him some diamonds but that no sale occurred because JONES wanted too much money for the diamonds. Petitioner WEINSTEIN did state that he, on July 4, 1973, purchased some gold coins from JONES.

Petitioner WEINSTEIN stated that when Agent JONKEY interviewed him on July 5, 1973, Agent JONKEY asked him if he had purchased any diamonds from JONES when JONES was in the store on Monday, to which Petitioner WEINSTEIN replied in the negative. Petitioner WEINSTEIN testified that when Agent JONKEY returned later that day, Agent JONKEY again asked him if he had purchased any loose diamonds from JONES on Monday, and again Petitioner WEINSTEIN said no. Petitioner WEINSTEIN testified that he was so upset by the fact that the F.B.I. had come to interview him that he called his attorneys and wrote down exactly what had occurred.

Petitioner WEINSTEIN'S son, LEONARD WEINSTEIN, testified that he travelled with his father to Albuquerque, leaving Las Vegas on June 26, 1973, and arriving back in Las Vegas on June 28, 1973.

The Government called Agent JONKEY as a witness in rebuttal, who repeated his testimony that the question he asked Petitioner WEINSTEIN upon interviewing him on July 5, 1973, was whether WEINSTEIN had ever purchased jewelry items or diamonds from JONES.

A Motion under Rule 29(b) of the Federal Rules of Criminal Procedure was made by Petitioner WEINSTEIN and denied by the District Court.

Following the trial, convictions and sentencing, the Petitioner appealed the judgment to the United States Court of Appeals for the Ninth Circuit and that Court affirmed.

REASON FOR GRANTING THE WRIT

I.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT EXECUTED AT HIS PLACES OF BUSINESS ON AUGUST 4, 1973.

Prior to the actual trial of the Case Below, Petitioner WEINSTEIN and the other defendants involved in this matter filed motions to suppress evidence seized pursuant to searches, including evidence seized from Petitioner WEINSTEIN'S places of business. A brief description of the facts leading up to these searches is necessary in order to properly evaluate this argument. A full dissertation of these facts is contained in the Order denying the motions to suppress, filed February 18, 1975, in the Court Below.

Special Agent WILLIAM JONKEY of the Federal Bureau of Investigation received, on July 3, 1973, two teletypes concerning certain information regarding Defendant JONES. Based on this information and based on his interview with Petitioner WEINSTEIN on July 5, 1973, Agent Jonkey followed Defendant JONES for a short period of time in Las Vegas. Agent JONKEY, accompanied by another agent of the Federal Bureau of Investigation, stopped his Government vehicle in such a manner as to prevent JONES from moving his, JONES', vehicle and approached JONES with gun drawn on July 5, 1973. Agent JONKEY testified that he did this in order to prevent JONES from leaving the scene. Agent JONKEY also testified that he contacted local police officers prior to approaching JONES. Agent JONKEY patted JONES down for weapons and asked JONES to identify himself. JONES was not placed under arrest by Agent JONKEY but JONES was told that he was being "detained" as a suspect in a jewelry store robbery in Phoenix, Arizona, until Agent JONKEY could determine whether there were any Federal warrants for JONES' arrest. It was later determined that there were no Federal warrants for JONES and Agent JONKEY did not officially arrest JONES.

Members of the local police force did arrest JONES for failure to register as an ex-felon and for being a fugitive from Arizona. These charges were later dropped. After this arrest the car in which JONES was previously riding was impounded and pursuant to this impound-type search a gun was found under the back seat of the car. Also, the trunk of the car was opened and certain incriminating items were seen. Sometime later, a search warrant was obtained by the local police force for this car at which time items 51 through 115

of the present indictment were seized. Agent JONKEY did not participate in this search of the car but was fully informed of what was seized by the local police department. Agent JONKEY did use information supplied by the local police force to obtain the search warrant for Petitioner WEINSTEIN'S premises. Items 1 through 50 of the present indictment were seized during the course of the searches of Petitioner WEINSTEIN'S businesses. Petitioner WEINSTEIN contends that the search warrants obtained for his premises were tainted by information seized illegally during the events enumerated above on July 5, 1973. It is submitted that the detention of JONES by Agent JONKEY on July 5, 1973, was an arrest. *United States v. Strickler*, 490 F.2d 378 (9th Cir., 1974). It is further submitted that this arrest of JONES by Agent JONKEY was without a warrant and without probable cause, and that any evidence arising from this illegal arrest must be suppressed.

Petitioner WEINSTEIN submits that he has standing to make this argument because he is charged with a violation of Section 2314, 18 United States Code, being the possessory claim of interstate transportation of stolen property. The Supreme Court in *Brown v. United States*, 93 S. Ct. 1665 (1973), stated that in order to challenge a search and seizure, the individual making the challenge must either be present on the premises at the time of the search, have a proprietary or possessory interest in the premises, or be charged with an offense that includes as an essential element possession of the seized items, by being charged with interstate transportation and conspiracy to transport in interstate commerce these elements.

In *United States v. Price*, 447 F.2d 23 (2 Cir., 1971), it was held that a defendant charged with possession of stolen property under 18 U.S.C., Section 659, had standing to object to the search of a building although he was not in the building at the time of the search and that the search was directed at a third person because of the fact that in addition to proof of possession, proof of theft, interstate transportation and knowledge was required.

Further, if, as admitted by Agent JONKEY, the items seized from JONES tainted the search warrant used to obtain the items from Petitioner WEINSTEIN'S businesses, the long-established "fruit of the poisonous tree" doctrine of *Silverthorne Lumber Company, Inc. v. United States*, 251 U.S. 285 (1920), and the holding of *Wong Sun v. United States*, 371 U.S. 471 (1963) must apply.

Further, it would be obviously a violation of Petitioner WEINSTEIN'S rights to allow into evidence in a trial of he alone any items taken from a co-defendant if the items were seized illegally.

II.

THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 29(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AT THE CLOSE OF ALL OF THE EVIDENCE.

The evidence in this case, even if taken in the light most favorable to the Government, as is requried, is insufficient to affirm the conviction of Petitioner

WEINSTEIN. Petitioner WEINSTEIN submits that the evidence is insufficient to prove that he knew the items purchased from Defendant JONES were stolen. Petitioner WEINSTEIN further submits that the evidence introduced is insufficient to prove that he transported in interstate commerce stolen property as is charged in the indictment and that the evidence is insufficient to show that any one trip in interstate commerce was jurisdictionally in the amount of $5,000.00.

The only evidence indicating that Petitioner WEINSTEIN had the knowledge that the goods purchased from Defendant JONES were stolen came from Defendant SHEPARD'S testimony. Defendant SHEPARD'S testimony is so incredible, and was shown to be so inaccurate, that even taken in the light most favorable to the Government, it cannot possibly be sufficient to affirm this conviction. Petitioner WEINSTEIN, as is noted in the Statement of Facts, owned a jewelry store and a pawn shop. The regular operating procedures of both of these stores includes the purchase or receipt of gems and jewelry items. In order to sustain Petitioner WEINSTEIN'S conviction it was necessary on the part of the Government to prove that the Petitioner knew the items purchased were stolen. Without Defendant SHEPARD'S incredulous testimony there is no evidence to indicate this fact.

Petitioner WEINSTEIN was charged in this indictment with interstate transportation of stolen property under 18 U.S.C. §2314. The indictment reads that WEINSTEIN along with the other defendants "did transport in interstate commerce" certain items of a stolen nature. The indictment did not charge that Petitioner WEINSTEIN caused the transportation. There was no evidence presented that Petitioner WEINSTEIN

transported any items in interstate commerce. The best that the evidence shows is that Petitioner WEINSTEIN received stolen property which was moving as or was a part of or constituted interstate commerce. This evidence, if constituting a crime at all, constitutes a crime under Section 2315 of 18 U.S.C.

It is true that the Government did charge along with the violation of Section 2314 a violation of 18 U.S.C., Section 2, being aiding and abetting; however, Petitioner WEINSTEIN submits that the evidence even taken in the light most favorable to the Government does not constitute an offense in violation of Section 2314 or Section 2 because he in no way transported or aided and abetted the actual transportation of any stolen goods in interstate commerce. The most the evidence could possibly show is that he received stolen property which moved in interstate commerce which would be a violation of Section 2315.

Further, Petitioner WEINSTEIN submits that the evidence produced by the Government did not prove that there was any single transportation in interstate commerce of items valued in excess of $5,000.00. There was conflicting testimony as to the value of many of the items contained in the indictment. There was uncontroverted testimony, by Defendant JONES, that the watches listed in the indictment were transported by JONES' wife sometime in May or June of 1973. Further, Defendant JONES testified that he made numerous trips between March and June of 1973, to Las Vegas for the purpose of selling items of jewelry. Petitioner WEINSTEIN testified, as did other witnesses, that JONES went to the Tower of Jewels on numerous occasions, and on each occasion transacted business with Petitioner WEINSTEIN. Therefore, it is submitted

that there was insufficient evidence to show that on any one trip in interstate commerce Defendant JONES brought more than $5,000.00 worth of stolen property.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner:

JACK WEINSTEIN

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was, on this 2nd day of September, 1976, mailed, postage prepaid, to the Honorable ROBERT BORK, Solicitor General, United States Department of Justice, Washington, D.C. 20534.

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 75-2584
v.	)	MEMORANDUM
	)	Of Affirmance
JACK WEINSTEIN, Appellant.	)	

Appeal from the United States District Court
for the District of Nevada

Before: ELY and WALLACE, Circuit Judges, and
ORRICK, District Judge.*

By indictment, Weinstein was charged with two offenses, conspiring to transport stolen property in interstate commerce and aiding and abetting in the transportation of interstate commerce, all in violation of sections 2371 and 2314. Convicted of both counts in a trial by jury, Weinstein appeals. We affirm.

The principal prosecution witness against Weinstein was one Shepard, a participant in the illegal enterprise. Weinstein attacks the credibility of Shepard, but our examination of the record convinces us that there was

*Honorable William H. Orrick, Jr., United States District Judge, Northern District of California, sitting by designation.

nothing inherently improbable about Shepard's incriminating testimony. Thus, the question of the credibility of Shepard, resolved adversely to Weinstein, justifiably rested within the determination of the jury. The evidence was abundantly sufficient to support the conviction of Weinstein on the conspiracy charge.

On the second count, as well as the first, Weinstein argues that certain evidence should have been suppressed, this evidence having been revealed in the search of an automobile of one Jones, another participant in the nefarious enterprise. Weinstein's argument in this respect is forclosed by the decision in *Brown v. United States*, 411 U.S. 223 (1973). Weinstein also argues that there was insufficient evidence to support the determination, beyond a reasonable doubt, that he participated in the interstate transportation of items having a value of $5,000 or more. It was unnecessary for the prosecution to prove that Weinstein personally transported the stolen jewelry in interstate commerce. *United States v. Knippenberg*, 502 F.2d 1056 (7th Cir. 1974). Moreover, it has been held that when different shipments are sufficiently related to one another, the value of each shipment may be aggregated so as to reach the statutory limit of $5,000. *Schaffer v. United States*, 362 U.S. 511 (1960).

The evidence as a whole, together with the reasonable inferences which the jury was enabled to draw therefrom, was sufficient to support Weinstein's convictions on both counts.

AFFIRMED.

EXHIBIT "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 75-2584
v.	)	ORDER
JACK WEINSTEIN, Appellant.	)	

Before: ELY and WALLACE, Circuit Judges, and ORRICK, District Judge.*

The panel (Ely, Wallace, and Orrick) has unanimously voted to deny the Petition for Rehearing. Judges Ely and Wallace have voted to reject the suggestion for en banc rehearing, and Judge Orrick has recommended that the suggestion be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

*Honorable William H. Orrick, Jr., United States District Judge, Northern District of California, sitting by designation.

Supreme Court, U. S.
FILED
DEC 15 1976
MICHAEL RODAK, JR., CLERK

No. 76-327

In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK WEINSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-327

JACK WEINSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence seized on his premises pursuant to a search warrant should have been suppressed because it was based on information derived from an allegedly unlawful arrest of another person. He also challenges the sufficiency of the evidence to support his conviction.

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of conspiring to transport and aiding and abetting the transportation of 115 items of stolen property in interstate commerce, in violation of 18 U.S.C. 2, 371, and 2314. He was sentenced to concurrent terms of three years' imprisonment on both counts, on the condition that after ninety days in jail-type confinement the

remainder of the sentence would be suspended, and petitioner placed on probation for the remainder thereof. He was further assessed cumulative fines of $10,000 on each count. The court of appeals affirmed (Pet. Exh. A).

The evidence at trial disclosed that petitioner, the owner of a jewelry store and a pawn shop in Las Vegas, Nevada, purchased the proceeds of two jewel robberies in Phoenix, Arizona, and Kansas City, Missouri, knowing them to have been stolen and pursuant to a conspiracy with the robbers. Evidence of these offenses was obtained primarily from searches of petitioner's jewelry and pawn shops pursuant to a warrant. Probable cause for the warrant was based on information derived from the arrest and subsequent searches of petitioner's co-defendant, Jones. Jones was arrested by an FBI agent and local police on the basis, *inter alia,* of information in an FBI teletype from Kansas City which identified Jones as one of the participants in the Kansas City robbery, described his car, and indicated that the proceeds were probably to be disposed of in Las Vegas. The evidence at trial also included testimony by one of the robbers that petitioner had indicated knowledge of the details of one of the robberies and had participated in a discussion in which another robbery was planned.

1. Petitioner does not dispute that the warrant to search his premises was supported by probable cause. Petitioner clearly lacks standing to challenge the arrest and subsequent search of Jones, which did not infringe petitioner's rights, and his contention to the contrary is without merit. *United States* v. *Calandra,* 414 U.S. 338, 348; *Brown* v. *United States,* 411 U.S. 223, 229-230; *Alderman* v. *United States,* 394 U.S. 165. In any event,

as the district court found, the record abundantly establishes that Jones's arrest was supported by probable cause.[1]

2. Petitioner contends that the evidence was insufficient to demonstrate that he knew the jewels were stolen, that he aided and abetted their interstate transportation, and the value of jewels involved in a "single transportation" exceeded $5,000 (Pet. 20-23). But the evidence included testimony by one of petitioner's co-defendants directly establishing petitioner's knowledge of and participation in the conspiracy, and petitioner's claim (Pet. 21) that such testimony was "incredible" asks the Court to invade the province of the jury. Petitioner does not claim that the value of the 115 items in the indictment was less than $5,000, and his contention that the jurisdictional amount must be met by "any single transportation in interstate commerce" (Pet. 22) is contrary to the statute. 18 U.S.C. 2314. See also *Schaffer* v. *United States,* 362 U.S. 511, 517-518.[2]

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[1]The circumstances surrounding Jones's arrest are set forth in detail in the district court's order denying the motion of all the defendants to suppress. The Kansas City teletype, which was received on the evening of July 3, 1973, indicated that Jones and others had robbed a Phoenix store on July 2, 1973, of $80,000 in loose diamonds (Order, p. 3). A portion of the diamonds had been disposed of in Las Vegas (Order, p. 4). The teletype indicated further that a source had told the FBI that the three men had left Kansas City on June 25 with the express purposes of robbing jewelry stores (*ibid.*). There was a description of Jones and other personal information about him. Another teletype from the FBI in Phoenix corroborated this information (Order, p. 5). The district court found that the information in these teletypes was reliable (Order, pp. 19-20).

[2]In any event, there was testimony from which the jury could conclude that a particular opal and diamond were transported during the same interstate trip in early June 1973, and there was expert testimony that these two items had a value in excess of $5,000 (Tr. 428, 430).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

DOJ-1976-12